Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

KIMBERLEE ANN McDONALD,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Petition For Writ Of Certiorari To The Washington Court Of Appeals, Division One

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May Washington state courts place the burden of proof on a party challenging the constitutionality of a facially discriminatory statute on Commerce Clause grounds, when this Court has repeatedly held that once discrimination against nonresidents is shown, the burden of proof falls upon the State to justify any statute which burdens interstate commerce, and to show the unavailability of adequate nondiscriminatory alternatives?

2. Like the tolling provision of the Ohio statute of limitations struck down by this Court in *Bendix v. Autolite Corp. v. Midwesco*, 486 U.S. 888 (1988), does application of the tolling provision of the Washington criminal statute of limitations, which tolls the statute for the period of time the defendant is not a resident of Washington State, violate the Commerce Clause of the United States Constitution when the defendant leaves Washington State to take a job in another State?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. PROCEDURAL HISTORY 3

B. STATEMENT OF FACTS 4

C. HOW THE FEDERAL QUESTIONS WERE DECIDED IN THE COURTS BELOW 10

REASONS FOR GRANTING THE WRIT 16

A. BY PLACING THE BURDEN OF PROOF ON McDONALD, THE STATE COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH THIS COURT'S PAST COMMERCE CLAUSE DECISIONS. THIS COURT HAS REPEATEDLY HELD THAT THE STATE BEARS THE BURDEN OF PROOF TO JUSTIFY A STATUTE WHICH DISCRIMINATES AGAINST NON-RESIDENTS OF THE STATE 16

B. BY ALLOWING THE POSSIBILITY OF SAVINGS IN TIME AND MONEY TO JUSTIFY THE DISCRIMINATORY TREATMENT OF NON-RESIDENTS WHO LEAVE THE STATE TO SEEK EMPLOYMENT ELSEWHERE, THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *BENDIX AUTOLITE CORP. v. MIDWESCO* WHERE THIS COURT REJECTED A SIMILAR ARGUMENT 19

TABLE OF CONTENTS – Continued

Page

CONCLUSION 21

APPENDIX A A-1

APPENDIX B..... B-1

APPENDIX C C-1

TABLE OF AUTHORITIES

Page

Federal Cases

Bendix Autolite Corp. v. Midwesco,
486 U.S. 888, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988) ..... *passim*

Chemical Waste Management, Inc. v. Hunt,
504 U.S. 334, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992) 17

Edwards v. California,
314 U.S. 160, 86 L.Ed. 119, 62 S.Ct. 164 (1941)..... 12

Hughes v. Oklahoma,
441 U.S. 322, 60 L.Ed.2d 250, 99 S.Ct. 1727 (1979) 17

Hunt v. Washington Apple Advertising,
432 U.S. 333, 53 L.Ed.2d 383, 97 S.Ct. 2434 (1977) 17

Maine v. Taylor,
477 U.S. 131, 91 L.Ed.2d 110, 106 S.Ct. 2440 (1986) 17

New Energy Co. v. Limbach,
486 U.S. 269, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988) 17

Tesar v. Hallas,
738 F. Supp. 240 (N.D. Ohio 1990) 12

Wyoming v. Oklahoma,
502 U.S. 437, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992) 17

State Cases

Crespo v. Stapf,
128 N.J. 351, 608 A.2d 241 (1992) 11

State v. Hernandez-Mercado,
124 Wn.2d 368, 879 P.2d 656 (1984) 18

TABLE OF AUTHORITIES – Continued

Page

State v. Koch,
38 Wn. App. 457, 685 P.2d 656 (1984) 13

State v. McDonald,
100 Wn. App. 828, 1 P.3d 1176 (2000)...1, 13, 14, 15, 21

State v. Schultz,
138 Wn.2d 638, 980 P.2d 1265 (1999) 13

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Constitution, Article I, § 8, cl. 3..... 2

U.S. Constitution, Amendment XIV 2

RCW 9A.04.080 (1996) 3

RCW 10.88.010 *et seq*.....14, 19

28 U.S.C. Section 1257(3)..... 1

ON PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON COURT OF APPEALS, DIVISION ONE

Petitioner, Kimberlee Ann McDonald, respectfully prays that a writ of certiorari issue to review the decision of the Washington Court of Appeals in this case.

OPINIONS BELOW

On May 15, 2000 the Washington Court of Appeals affirmed the conviction of petitioner McDonald for four counts of first degree theft and two counts of second degree theft. (Appendix A). The opinion, as amended by the November 9, 2000 order of the Washington Court of Appeals (Appendix B), was partially published. The published opinion can be found at *State v. McDonald*, 100 Wn. App. 828, 1 P.3d 1176 (2000).

JURISDICTION

Petitioner's petition for review was denied by the Washington Supreme Court on March 6, 2001. A copy of this order appears as Appendix C to this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 8, clause 3 of the United States Constitution provides in pertinent part:

> The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.

UNITED STATES CONSTITUTION, art. I, § 8, clause 3.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law . . . .

UNITED STATES CONSTITUTION, Amendment XIV, § 1.

Washington State's criminal statute of limitations provides in pertinent part:

> (1) Prosecutions for criminal offenses shall not be commenced after the periods prescribed in this section.
>
> * * *
>
> (g) No other felony may be prosecuted more than three years after its commission.
>
> * * *
>
> (2) *The periods of limitation prescribed in subsection (1) of this section do not run during any time*

when the person charged is not usually and publicly resident within this state.

RCW 9A.04.080 (1996) (italics added).

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

McDonald was charged by information in King County Superior Court with four counts of first degree theft and two counts of second degree theft. She moved to dismiss these charges on the ground that the statute of limitations had expired. The prosecution argued that the applicable three year statute of limitations had not expired, because it had been tolled throughout the lengthy period of time that McDonald had resided in the State of New York. McDonald argued that the tolling provision of the statute of limitations violated the Commerce Clause of the United States Constitution. She also argued that the six year pre-accusatorial delay violated the Due Process Clause of the Fourteenth Amendment.

Following an evidentiary hearing, the Superior Court denied McDonald's pretrial motion to dismiss, rejecting both her Commerce Clause and Due Process Clause arguments. The case was then tried to the bench before the Honorable Faith Ireland, who found McDonald guilty as charged. On March 13, 1998 McDonald was sentenced to concurrent prison terms of 22 and 14 months.

McDonald appealed to the Washington Court of Appeals, Division One, which affirmed her convictions in a partially published opinion issued on May 15, 2000.

(Appendix A). McDonald filed a timely motion for reconsideration. The Washington Court of Appeals ordered the State to file a response to the motion for reconsideration. Thereafter, on November 9, 2000 the Court of Appeals modified its opinion and denied the motion for reconsideration. (Appendix B).

On December 6, 2000, McDonald filed a petition for review, seeking further appellate review by the Washington Supreme Court. On March 6, 2001 the Washington Supreme Court denied McDonald's petition for review. (Appendix C).

B. STATEMENT OF FACTS

McDonald used to be an attorney licensed to practice in Washington State. CP 15, ¶ 2.[1] In August of 1990 several clients complained to the State Bar Association that McDonald had appropriated their funds. McDonald responded to the bar complaints acknowledging her misconduct. *Id.* at ¶ 3. On December 3, 1990 McDonald entered into a stipulation with the Bar, that provided for an order of immediate suspension of her license to practice. *Id.* at ¶ 4; CP 18, at ¶ 9. On December 4, 1990 this Court entered an order suspending McDonald from the bar. CP 19, at ¶ 10.

Shortly thereafter McDonald packed up her office, stored all her client files, gave the Post Office directions as to how to forward her mail, and then, on December 21,

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[1] "CP" refers to the Clerk's Papers on file with the Washington Court of Appeals.

1990, McDonald moved to New York State. CP 19, ¶ ¶ 11, 13-14. She instructed the Post Office to forward her mail to 270 Summit Avenue, Mt. Vernon, N.Y. *Id.* In New York she continued to receive correspondence from the Washington State Bar Association. *Id.* In March of 1991 McDonald moved to 4A Lyon Street, Ryebrook, New York. CP 20, ¶ 16. She lived there for the next four and a half years. *Id.* She registered to vote in New York, obtained a New York State driver's license, and rented a mail box and provided that mail box address to the Washington State Bar Association, which sent mail to her at that address. *Id.* In May of 1991 McDonald began working on a part time basis for the National Audubon Society. CP 20, at ¶ 17. She became a full time employee of the National Audubon Society in July of 1991. *Id.*

In November of 1991 McDonald received a letter at her Ryebrook, N.Y. home address, from an Assistant United States Attorney in Seattle, informing her that the U.S. attorney was considering bringing criminal charges against her. *Id.*

In January of 1992 McDonald applied, and in April she was accepted, into Yale University's graduate school of forestry. CP 21, at ¶ 21. Meanwhile the Washington State Bar Association recommended that McDonald be disbarred; and on April 3, 1992 she was disbarred. CP 21, at ¶ 22.

In August of 1992 McDonald began attending Yale graduate school. CP 21, at ¶ 22. She continued working for the National Audubon Society and living in Ryebrook, N.Y. *Id.* She traveled to Manhattan to work three days a

week, and to New Haven, Connecticut to attend school two days a week. CP 22, at ¶ 23.

In August of 1993, FBI agents visited McDonald's parents' home on Virginia Street in Seattle and obtained McDonald's Ryebrook, N.Y., address. CP 119, at ¶ 7. On August 25, 1992 McDonald was indicted on seven counts of bank fraud and four counts of mail fraud. CP 22, at ¶ 25. Because McDonald was then a resident of New York, the federal criminal case was transferred to the U.S. District Court for the Southern District of New York. CP 23, at ¶ 27. On or about August 30, 1993, three FBI agents knocked on McDonald's door in Ryebrook, N.Y., arrested her, and took her to an FBI office in Yonkers, N.Y., where she admitted to all the allegations against her, was fingerprinted, photographed, and released on her own recognizance. CP 22, at ¶ 26. Pursuant to a plea agreement with the United States, in January of 1994 McDonald pled guilty to one count of bank fraud and the remaining counts were dismissed. CP 23, at ¶ 28. On April 22, 1994 the Honorable Charles Brieant, U.S. Dist. Court Judge, sentenced McDonald to four years of supervised probation. CP 25, at ¶ 31.

McDonald continued to live in New York throughout the time period following her arrest, and her prosecution and sentencing in federal court. She lived in New York until September of 1995. CP 25, at ¶ 32. She also continued to work for the National Audubon Society and to study at Yale after her federal sentencing. *Id.* In January of 1995 McDonald applied to several Ph.D. programs in forestry. *Id.* In May of 1995 she received her masters degree in forestry from Yale. *Id.*

After being accepted into the University of Washington Ph.D. program, McDonald returned to Seattle on September 13, 1995, and began attending the University of Washington on September 18, 1995. CP 25, at ¶ 33. McDonald continued to work full time for the National Audubon Society. *Id.* On May 1, 1996 McDonald was fired by the Audubon Society when it was discovered that she had a federal conviction. CP 25, at ¶ 34. In June of 1996 McDonald began working as a research associate for the University of Washington Forestry Department. CP 26, at ¶ 35. In September of 1996 she got a job as a part time instructor at the University. *Id.* Then in January of 1997 McDonald took a full time job in Seattle as director of marketing for a nonprofit organization. CP 26, at ¶ 36.

On April 5, 1997, McDonald received a letter from the King County Prosecuting Attorney's Office, informing her that she had been charged with six counts of felony theft. CP 26, at ¶ 37. McDonald appeared at arraignment and entered a plea of not guilty. *Id.*

Patrick Sainsbury, Chief of the Fraud Division of the King County Prosecutor, acknowledged that McDonalds's case first came to his attention on January 3, 1991 – more than six years earlier – when he got a call from one of McDonald's former clients who complained he had been defrauded of $60,000. RP 12/16/97, at 116.[2] Following his conversation with this citizen, Sainsbury contacted the Washington State Bar Association, and learned that staff disciplinary counsel there already had commenced an

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[2] "RP" refers to the Report of Proceedings (the transcript) of the evidentiary hearing held on McDonald's motion to dismiss.

investigation, and that the FBI had also already started investigating McDonald. RP 12/16/97, at 117-18.

On January 7, 1991 Sainsbury had a phone conversation with the FBI Agent handling the federal investigation, and a conversation with Mr. Robert Westinghouse, Chief of the Criminal Division of the U.S. Attorney's Office. RP 12/16/97, at 119, 199. Sainsbury and Westinghouse discussed whether the prosecution of McDonald should be state or federal, and they agreed that it would be handled as a federal case. RP 12/16/97, at 199.

Since it was decided that the U.S. Attorney would prosecute McDonald, Sainsbury did nothing more. RP 12/16/97, at 120. From January 7, 1991 until October 4, 1993 the King County Prosecutor's office took no action whatsoever. RP 12/16/97, at 120. On that date Sainsbury was advised by Westinghouse that McDonald had been arrested by the FBI and indicted in federal court. RP 12/16/97, at 120. Sainsbury again concluded that since the federal prosecution was proceeding, it was unnecessary for him to do anything. RP 12/16/97, at 121. Eight months later, on June 20, 1994, based on the assumption that McDonald's federal prosecution was over, Sainsbury closed his investigatory file. RP 12/16/97, at 122.

On July 7, 1994 Sainsbury received a letter from an attorney representing one of McDonald's former clients, and in the letter the attorney complained that McDonald's federal sentence had been too lenient. RP 12/16/97, at 123. The attorney requested that Sainsbury bring state criminal charges against McDonald. RP 12/16/97, at 124.

On July 19, 1994 Sainsbury requested a copy of the sentencing transcript from federal court, and a copy of the federal indictment. RP 12/16/97 at 125. In August of 1994 Sainsbury received a copy of the sentencing transcript, but not the copy of the indictment he requested. RP 12/16/97, at 126. Sainsbury then did nothing for another eight months, and then on April 21, 1995 Sainsbury wrote the State Bar Association and asked for access to the Bar's investigatory files pertaining to McDonald. RP 12/16/97, at 127.

In May of 1995, the bar association provided Sainsbury with information about the identity of all of McDonald's former clients who had made complaints, and Sainsbury spent about a week calling those people. RP 12/16/97, at 129, 131.

From June 6, 1995 until March 12, 1996 Sainsbury took no action whatsoever. RP 12/16/97, at 133. Then, in March of 1996 Sainsbury requested and received approval from his superior, King County Prosecuting Attorney Norm Maleng, to bring state criminal charges against McDonald. RP 12/16/97, at 133.

At the pretrial hearing held before Judge Ireland, Sainsbury acknowledged that during the 5½ years from January 1991 to June 1996, he spent less than two weeks working on the case. RP 12/16/97, at 134. On August 8, 1996 Sainsbury assigned the case to Fraud Division Investigator Herb Duncan, who obtained bank records from the state bar in the latter part of 1996 or early 1997. RP 12/16/97, at 86. Duncan spent about two weeks scheduling bank records, but otherwise did nothing else to investigate the case. RP 12/16/97, at 86, 110. State criminal

charges were finally filed in March of 1997, more than six years after the prosecutor's office first became aware of McDonald's actions, and some 6½ to 8 years after the six theft offenses were committed. RP 12/16/97, at 135.

Sainsbury admitted that but for the provision in RCW 9A.04.080 tolling the statute of limitations when the suspect is out of the state, the criminal statute of limitations would have expired in November of 1993. RP 12/16/97, at 136. Based on this statute, and the fact that McDonald did not live in Washington from December 21, 1990 through September 13, 1995, the prosecution maintained that the applicable three year statute of limitations had not expired by the time the charges were filed in March of 1997.

C. HOW THE FEDERAL QUESTIONS WERE DECIDED IN THE COURTS BELOW

In support of her pretrial motion to dismiss McDonald relied upon this Court's decision in *Bendix Autolite Corp. v. Midwesco*, 486 U.S. 888, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988). There this Court held that a tolling provision that tolled a civil statute of limitations when a defendant moved out of the state violated the Commerce Clause. This Court ruled that it violated the Commerce Clause to force a defendant to choose between (1) moving to another state, and thus having the statute of limitations perpetually tolled so that he would always remain subject to suit in Ohio, or (2) forfeiting his right to leave Ohio in order to go do business in another state, staying in Ohio, and thereby obtaining the benefit of the running of a statute of limitations.

> The Ohio statutory scheme thus forces a foreign corporation to choose between exposure to the general jurisdiction of the Ohio courts or forfeiture of the limitations defense, remaining subject to suit in Ohio in perpetuity.

Bendix, 486 U.S. at 893.

This Court further noted: "To gain the protection of the limitations period, Midwesco [the defendant] would have had to appoint a resident agent for service of process in Ohio and subject itself to the general jurisdiction of the Ohio Courts." *Id.* at 892. Even though appointment of a resident agent may have seemed a small thing, the Supreme Court found that "The burden the tolling statute places on interstate commerce is significant." *Id.* at 891.

McDonald argued that since she was not a corporation, and could not appoint a person to serve as her agent for service of process, there was no way she could be present in Washington, and at the same time move to New York to seek new employment. Thus she would have to remain in Washington for three years to get the benefit of the running of the statute of limitations. McDonald argued that this was a much bigger burden on her than the burden on the defendant corporation which this Court found significant in *Bendix*. *See Crespo v. Stapf*, 128 N.J. 351, 365, 608 A.2d 241 (1992) ("Requiring a person to establish residency, which subjects him or her to the general jurisdiction of state courts, is even more burdensome than requiring a corporation to obtain a certificate to do business or to designate an agent for the service of process.").

McDonald further noted that in *Bendix* this Court *rejected* the contention that because it was more costly or more difficult to serve out of state defendants, that the State's interest in reducing litigants' expenses justified the burden on interstate commerce. *Bendix*, 486 U.S. at 894. McDonald asked the Superior Court to strike down Washington's tolling statute as a burden on interstate commerce, as this Court had done in *Bendix*.

Initially, the trial court rejected the prosecution's contention that a natural person could not raise a Commerce Clause challenge to a tolling statute. *See Edwards v. California*, 314 U.S. 160, 62 S.Ct. 164, 86 L.Ed.2d 119 (1941) (movement of migrant workers coming into California to seek employment falls within the Commerce Clause, and state law burdening such movement violates the Clause); *Tesar v. Hallas*, 738 F.Supp. 240, 242 (N.D. Ohio 1990) (Suit against defendant who left Ohio to take a job in Pennsylvania barred by statute of limitations, because tolling provision was unconstitutional.)

The Superior Court nevertheless rejected McDonald's Commerce Clause contention on the grounds that if she accepted the notion that the tolling provision burdened commerce, the result of such a holding would be that the State "would be required to extradite in every case where a person leaves the state in order to avoid the Statute of Limitations." RP 12/18/97, at 13.

On direct appeal McDonald argued to the Washington Court of Appeals that the Superior Court's reasoning was obviously flawed, since the issue of whether or not to extradite does not even arise until *after* a charge is

brought. First the charge is brought. Then, if the defendant does not appear in answer to a summons, the issue arises whether the State wishes to seek extradition. Whether or not the State seeks extradition has nothing at all to do with the filing of the charge, or with the Statute of Limitations.[3]

The Washington Court of Appeals affirmed McDonald's conviction, and rejected her Commerce Clause argument, but it did not rely on precisely the same reasoning as that advanced by the Superior Court.

First, the Washington Court of Appeals squarely put the burden of proof on McDonald to prove that the tolling provision of RCW 9A.04.080 is unconstitutional:

> A statute is presumed to be constitutional, and the party attacking it has the heavy burden of proving its unconstitutionality beyond a reasonable doubt.

State v. McDonald, 100 Wn. App. at 831, citing to *State v. Schultz*, 138 Wn.2d 638, 642, 980 P.2d 1265 (1999).

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[3] As McDonald noted below, had the State charged McDonald within the three year period, and simply mailed a summons to her New York address, she most likely would have responded, and would have returned to Washington to answer the charge. Had that occurred, no extradition issue would ever have arisen.

Moreover, even if she had ignored the summons, the State would not have been required to commence extradition "in order to avoid the Statute of Limitations running," as Judge Ireland concluded, because the Statute of Limitations would already have stopped running due to the filing of the information. *See State v. Koch*, 38 Wn. App. 457, 685 P.2d 656 (1984).

According to the Washington Court of Appeals, the *Bendix* analysis of the Supreme Court required that it "weigh and assess the State's putative interests against the interstate restraints to determine if the burden imposed on interstate commerce is reasonable." *McDonald*, 100 Wn. App. at 834. The Court below did not cite to any portion of the *Bendix* decision to support this statement.

Noting that "[t]he State's interest in prosecuting alleged violations of criminal law is strong," and that investigation of a crime "generally may be more difficult" if the suspect is out of the State, since he or she "may be unavailable for lineups or other investigative techniques," the Washington Court of Appeals concluded that it was reasonable for the Washington Legislature to place a restraint on leaving the State to seek or take employment elsewhere, because that made investigation of the alleged violation of criminal law less costly:

> But the tolling provision allows the State to conserve scarce resources by potentially avoiding the time and expense associated with extradition. Rather than initiating extradition, the State may decide, in its discretion, to see whether a person returns to the State before prosecution. Conserving scarce resources is a reasonable basis for relying on the tolling provision at issue here.

McDonald, 100 Wn. App. at 835.

Although the Washington Court of Appeals did not approve the Superior Court's faulty logic that extradition would be required in every case of an out-of-state defendant, the appeals court concluded that in some cases

extradition would be desirable, and that since extradition costs money, it was reasonable for the State to "conserve scarce resources" by simply declaring that the statute of limitations would not run against any such out-of-state defendant, thus making it unnecessary to ever have to pay the costs of extradition. Since the desire to conserve resources was "not an unreasonable rationale," the Court of Appeals concluded that McDonald had not carried her burden of proving the tolling statute unconstitutional:

> The State's interest in conserving scarce resources by avoiding the time and expense of extradition is not an unreasonable rationale for deferring prosecution based on the tolling provision of the statute. McDonald fails in her burden to show beyond a reasonable doubt that the tolling provision of the statute is unconstitutional.

McDonald, 100 Wn. App. at 835.

In her motion for reconsideration, McDonald argued that Washington State could not rely on a general principle that a statute is always presumed to be constitutional until the challenger carries the burden of proving that it is not, because this general rule conflicted with this Court's longstanding rule that when a state statute burdens interstate commerce, the State bears the burden of proving that the burden is justified and that nondiscriminatory alternative means of advancing local interests are not available. McDonald argued that Washington State could not apply a burden of proof rule that conflicted with this Court's contrary constitutional rule.

The Court of Appeals denied McDonald's reconsideration motion without making any further comment

on the Commerce Clause issue, and without addressing the issue of the proper allocation of the burden of proof in cases where a statute is challenged on Commerce Clause grounds.

REASONS FOR GRANTING THE WRIT

A. BY PLACING THE BURDEN OF PROOF ON McDONALD, THE STATE COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH THIS COURT'S PAST COMMERCE CLAUSE DECISIONS. THIS COURT HAS REPEATEDLY HELD THAT THE STATE BEARS THE BURDEN OF PROOF TO JUSTIFY A STATUTE WHICH DISCRIMINATES AGAINST NON-RESIDENTS OF THE STATE.

In *Bendix* this Court held that a provision of a state statute of limitations which tolled the running of the statute for any period during which a person or corporation is not "present" in the State, violated the Commerce Clause by discriminating against non-residents. This Court recognized that "[t]he burden the tolling statute places on interstate commerce is significant." 486 U.S. at 891.

For decades this Court has held that once a party shows that a state statute places a significant burden on interstate commerce, or discriminates against non-residents of the State either on its face or in its practical effect, the burden to justify the statute is on the State.

> The burden to show discrimination rests on the party challenging the validity of the statute, but

> "[w]hen discrimination against commerce . . . is demonstrated, ***the burden falls on the State to justify it, both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives*** adequate to preserve the local interests at stake."

Hughes v. Oklahoma, 441 U.S. 322, 336, 60 L.Ed.2d 250, 99 S.Ct. 1727 (1979). *Accord Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 342, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992); *Wyoming v. Oklahoma*, 502 U.S. 437, 456, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992); *New Energy Co. v. Limbach*, 486 U.S. 269, 278, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988); *Maine v. Taylor*, 477 U.S. 131, 138, 91 L.Ed.2d 110, 106 S.Ct. 2440 (1986); *Hunt v. Washington Apple Advertising*, 432 U.S. 333, 353, 53 L.Ed.2d 383, 97 S.Ct. 2434 (1977).

The decision below is contrary to all these precedents. The state court's "presumption of constitutionality" of a Washington statute cannot be applied when it conflicts with this Court's burden of proof rule that presumes the *un*constitutionality of a statute which discriminates against non-residents, and which requires the State to prove the validity of the statute. The Washington Court of Appeals analyzed a facially discriminatory statute which penalizes out-of-state residents, and yet *relieved* the State of its burden of proving that the discrimination and the burden on interstate commerce was justified, and that the State's interests could not be satisfied by nondiscriminatory alternatives. Contrary to this Court's long line of precedent requiring the State to bear the burden of justifying such a statute, the Washington Court of Appeals placed the burden of proof on petitioner to show that the discriminatory burden

imposed on non-residents was unreasonable, and therefore unconstitutional.[4]

Petitioner asks this Court to grant certiorari to review the Washington Court of Appeals' erroneous conclusion that when challenging a statute which discriminates on its face against non-residents on Commerce Clause grounds, it is the challenger who bears the burden of proof to show that the burden imposed is unreasonable.

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[4] Unfortunately, such unconstitutional burden shifting is not uncommon in Washington state courts. Even the most blatantly unconstitutional statutes, such as those which on their face discriminate against aliens, are routinely upheld against equal protection challenges on the grounds that the challenger has not proved that the statue is unconstitutional. *See, e.g., State v. Hernandez-Mercado,* 124 Wn.2d 368, 879 P.2d 283 (1994) (despite recognition that the statute was "inherently suspect and subject to strict judicial scrutiny," and that government's argument that statute was necessary to promote a compelling governmental interest was "weak", nevertheless the state supreme court rejected an equal protection attack against a statute which discriminated on its face against aliens because challenger did not prove that the statute was unconstitutional).

B. BY ALLOWING THE POSSIBILITY OF SAVINGS IN TIME AND MONEY TO JUSTIFY THE DISCRIMINATORY TREATMENT OF NON-RESIDENTS WHO LEAVE THE STATE TO SEEK EMPLOYMENT ELSEWHERE, THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *BENDIX AUTOLITE CORP. v. MIDWESCO* WHERE THIS COURT REJECTED A SIMILAR ARGUMENT.

In *Bendix* this Court struck down a statute that afforded state residents the benefit of the running of a statute of limitations, but denied this benefit to non-residents who had once lived inside the state. This Court held that even though it was more costly and more difficult to serve process on out-of-state defendants, that was *not* a sufficient justification for such a discriminatory statute which placed a significant burden on interstate commerce by deterring people from leaving one state to engage in economic activity in another state. Moreover, this Court explicitly noted that there was a non-discriminatory alternative – use of the state's long arm statute to serve people outside the state with process. The same nondiscriminatory alternative exists here. Washington State has adopted the Uniform Criminal Extradition Act, which is codified at RCW 10.88.010 *et seq.*, and thus can obtain personal jurisdiction over former residents who have left the State and gone to live in other states.

In *Bendix* this Court recognized that it was true that serving non-resident, foreign defendants "may be more arduous" than serving resident, in-state defendants. Although this fact regarding residents and non-residents might constitute a rational justification that would

uphold a statute against a due process or equal protection attack, this Court nevertheless found this justification "insufficient to withstand Commerce Clause scrutiny" because it was clear that the State's long arm statute permitted service on non-residents who had left the State.

> Ohio cannot justify its statute as a means of protecting its residents from corporations who become liable for acts done within the State but later withdraw from the jurisdiction, for it is conceded by all parties that the Ohio long arm statute would have permitted service on Midwesco throughout the period of limitations.

Bendix, 486 U.S. at 893-94. Even though a corporation has the option of designating an agent within the State for service of process, an option which a natural person like petitioner McDonald does not have, this Court held that requiring such a designation would be an unreasonable burden on commerce. *Id* , at 895.

In the present case, however, the Washington Court of Appeals has upheld Washington's tolling provision against a Commerce Clause attack, solely on the grounds that it might be more time consuming and expensive to commence prosecutions against non-resident defendants living in other states.

> [T]he tolling provision allows the State to conserve scarce resources by potentially avoiding the time and expense associated with extradition. Rather than initiating extradition, the State may decide, in its discretion, to see whether a person returns to the State before prosecution. Conserving scarce resources is a reasonable

basis for relying on the tolling provision at issue here.

State v. McDonald, 100 Wn. App. at 835.

The state court has thus decreed that it is constitutionally permissible to force people like McDonald to turn down employment opportunities in other states as the price to be paid for continued running of the criminal statute of limitations. In *Bendix* this Court refused to sanction differential statute of limitations treatment of residents and non-residents on the grounds that long arm service of process on non-residents was more "arduous." And yet in the present case the Washington Court of Appeals upheld differential treatment of non-residents who left the State to seek employment elsewhere, solely on the grounds that the tolling provision of the statute of limitations would potentially permit the State to avoid the time and expense of extradition. This holding is directly contrary to this Court's holding in *Bendix*.

CONCLUSION

For the reasons stated above petitioner McDonald asks this Court to grant her petition for certiorari, to decide (1) whether the tolling provision of Washington's criminal statute of limitations violates the Commerce Clause in the same manner that the Ohio statute of limitations did in *Bendix;* and (2) whether the Washington Court of Appeals erred when it required petitioner to prove that the statute's discriminatory burden on the interstate commerce of non-residents was unreasonable, instead of requiring the State to prove that statute

advanced legitimate local interests and that there were no available nondiscriminatory alternative ways of achieving them.

DATED this 1st day of June 2001.

Respectfully submitted,

JAMES E. LOBSENZ
Counsel of Record for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KIMBERLEE ANN McDONALD, Appellant.	No. 42359-2-1 DIVISION ONE PUBLISHED IN PART FILED: MAY 15 2000

COX, J. – At issue is whether the trial court should have dismissed felony theft charges against Kimberlee McDonald that the State filed almost six and one-half years after the last of the alleged offenses occurred. The applicable statute of limitation is three years, exclusive of applicable periods of tolling.[1] Because the tolling provision of RCW 9A.04.080 does not violate the Commerce Clause of the federal constitution, we affirm.

McDonald was admitted to practice law in Washington State in 1981. In December 1990, she stipulated with the Washington State Bar Association that she had misappropriated client trust funds. The Bar immediately suspended her from practice. Two years later, our Supreme Court disbarred her.

Immediately after her 1990 suspension from the practice of law, McDonald moved to the state of New York. She did not conceal herself there. McDonald left her

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[1] RCW 9A.04.080.

forwarding address with the postal service in Seattle and continued to receive mail in New York from the Washington State Bar Association. She also received mail there from her former clients and other creditors seeking payment. While living in New York, she visited Seattle several times each year to visit her parents and for activities related to her employment with the National Audubon Society.

In August 1993, the U.S. Attorney indicted McDonald on seven counts of bank fraud and four counts of mail fraud.[2] All charges were based on McDonald's misappropriation of client funds in Washington during 1989 and 1990. Because McDonald was then a resident of New York, the case was transferred to the U.S. District Court for the Southern District of New York.

In January 1994, McDonald pled guilty to one count of bank fraud, and the court dismissed the remaining charges. The court sentenced her to a four-year period of supervised probation, a downward departure from the standard sentencing range of 21 to 27 months in prison.

In May 1995, McDonald earned her master's degree from Yale. She moved back to Seattle that fall and enrolled in a Ph.D. program at the University of Washington.

In April 1997, the King County Prosecutor filed the charges that are the subject of this appeal.[3] McDonald

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[2] 18 U.S.C. 1344 and 1341.

[3] The State charged McDonald with four counts of first degree theft and two counts of second degree theft for actions occurring between November 7, 1989 and May 7, 1990.

unsuccessfully moved to dismiss the charges. At the conclusion of a bench trial, the court found her guilty, as charged, and imposed a sentence of 14 months in prison for two of the counts and 22 months for the remaining four counts. The sentences are to be served concurrently.

McDonald appeals.

Commerce Clause

McDonald claims that the tolling provision of RCW 9A.04.080(2) subjected her to perpetual liability for the felony theft charges and violates the Commerce Clause of the federal constitution. We hold that McDonald has failed to prove beyond a reasonable doubt that the tolling statute is unconstitutional.

We do not construe a statute that is unambiguous.[4] We assume that the Legislature means exactly what it says.[5] A statute is presumed to be constitutional, and the party attacking it has the heavy burden of proving its unconstitutionality beyond a reasonable doubt.[6] The constitutionality of a statute is a question of law that we review de novo.[7]

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[4] *State v. McCraw*, 127 Wn.2d 281, 288, 898 P.2d 838 (1995).

[5] *McCraw*, 127 Wn.2d at 288.

[6] *State v. Shultz*, 138 Wn.2d 638, 642, 980 P.2d 1265 (1999) (citing *State v. Blank*, 131 Wn.2d 230, 235, 930 P.2d 1213 (1997)).

[7] *Shultz*, 138 Wn.2d at 643 (citing *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 623, 957 P.2d 691 (1998)).

The provisions of the statute that were applicable when the State filed the charges against McDonald, former RCW 9A.04.080, provided as follows:

> (1) Prosecutions for criminal offenses shall not be commenced after the periods prescribed in this section.
>
> (g) No other felony may be prosecuted more than three years after its commission. . . .
>
> (2) *The periods of limitation prescribed in subsection (1) of this section do not run during any time when the person charged is not usually and publicly resident within this state.*[8]

We first note that the tolling provisions of subsection (2) of the statute have been the subject of two published opinions. In *State v. Ansell*,[9] Division III of this court held that RCW 9A.04.080(2) was unambiguous. Relying on a leading Illinois case, *People v. Carman*,[10] the court concluded that "not usually and publicly resident" within the Washington statute simply means "absent" from this state.[11] There, the statute of limitation for statutory rape was tolled while Ansell lived outside the state. This was so despite the fact that he did not conceal himself while out of state.

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[8] RCW 9A.04.080 (1996) (italics ours).

[9] 36 Wn. App. 492, 675 P.2d 614, *review denied*, 101 Wn.2d 1006 (1984).

[10] 385 Ill. 23, 52 N.E.2d 197 (Ill. 1943).

[11] *Ansell*, 36 Wn. App. at 494.

In *State v. Newcomer,*[12] Division III held that the statute of limitation was tolled while Newcomer was incarcerated outside of Washington. Although Newcomer was "available" for prosecution in Washington under extradition provisions of the Interstate Agreement on Detainers, that was irrelevant for purposes of the plain wording of the tolling provision in the limitation statute. Newcomer was "not usually and publicly resident within [Washington]," and that is all that is required for tolling the statute of limitation under RCW 9A.04.080(2).

This case is indistinguishable from *Ansell* and *Newcomer* for purposes of construing the tolling provision of the statute. McDonald was absent from Washington during the period in question. It makes no difference whether she was hiding or whether there were available mechanisms for returning her to this state. There is no other reasonable reading of the plain wording of the tolling provision of RCW 9A.04.080(2).

Relying primarily on *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.,*[13] McDonald attempts to avoid the construction of the tolling provision stated in *Ansell* and *Newcomer.* She argues that such a rule violates the Commerce Clause of the United States Constitution.[14] More specifically, she contends the tolling provision burdens interstate commerce because it requires her to either

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[12] 48 Wn. App. 83, 737 P.2d 1285, *review denied,* 109 Wn.2d 1014 (1987).

[13] 486 U.S. 888, 108 S. Ct. 2218, 100 L. Ed. 2d 896 (1988).

[14] U.S. Const. art. 1, § 8, cl. 3, which vests Congress with the "power . . . to regulate Commerce with foreign Nations, and among the states."

remain in Washington, forfeiting job and educational opportunities elsewhere, or be perpetually subject to criminal charges here if she leaves the state. That argument is untenable, and we reject it.

In *Bendix*, the Supreme Court considered whether a tolling provision in an Ohio statute of limitation governing contract actions was unconstitutional under the Commerce Clause. The statute was tolled for any period that a person or corporation was not "present" in Ohio.[15] For purposes of the statute, being "present" required a foreign corporation to appoint an Ohio agent for service of process. But appointing such an agent operated as consent to general jurisdiction of the Ohio courts over the foreign corporation.[16] The Court noted that a state regulation that burdens interstate commerce in a way not applicable to local business or trade may be discriminatory and invalidated outright. Alternatively, the Court could weigh and assess the State's putative interest against the interstate restraints to determine if the burden is unreasonable.

Choosing the latter method of analysis in the case before it, the Court held that the State's putative interests were outweighed by the burden on commerce. The State's interests were outweighed because the statutory scheme forced a foreign corporation to choose between subjecting itself to general jurisdiction for all causes of action in Ohio's courts or remaining subject in perpetuity to suit on the specific cause of action in the pending suit.

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[15] *Bendix*, 486 U.S. at 891.

[16] *Bendix*, 486 U.S. at 891.

McDonald has not cited a single case that has applied the *Bendix* decision to invalidate a statute of limitation governing the filing of criminal charges. And we have not found any such case in our independent research.

Without citation to authority, the State argues that *Bendix* has no application here because criminal conduct is not commerce. But we need not address that contention.

We assume, without deciding, that an analysis under the Commerce Clause properly applies to this criminal case. Thus, we apply the *Bendix* analysis. That analysis requires that we weigh and assess the State's putative interests against the interstate restraints to determine if the burden imposed on interstate commerce is unreasonable.

The State's interest in prosecuting alleged violations of its criminal laws is strong.[17] Indeed, the United States Supreme Court has previously held that a state's interest in prosecuting crimes is so significant as to justify burdening a person's fundamental constitutional right to

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[17] *See, e.g., United States v. Hensley*, 469 U.S. 221, 229, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985) (recognizing the "strong government interest in solving crimes and bringing offenders to justice"); *Schall v. Martin*, 467 U.S. 253, 264, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984) (stating that government has a legitimate and compelling interest in protecting the community from crime); and *Flanagan v. United States*, 465 U.S. 259, 265, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984) (observing that "when a crime is committed against a community, the community has a strong collective psychological and moral interest in swiftly bringing the person responsible to justice").

travel from one state to the next.[18] Moreover, the State's interest in prosecuting crimes is compromised where a person leaves the state before or after charges are filed because investigation generally may be more difficult. For example, the absent person may be unavailable for questioning. He or she may not be available for lineups or other investigative techniques. And the person may have taken important evidence when leaving the state.

Here, the record is mixed on whether McDonald's absence compromised the State's investigation. She was available for questioning in New York by federal authorities. Presumably, she was also available there for questioning by Washington authorities had they chosen to contact her. The record is unclear whether McDonald took with her when she moved to New York evidence that was necessary for the State to have to decide whether to prosecute. What is clear is that she stipulated, in writing, before leaving Washington that she had misused client funds. And that evidence was used against her at trial.

But the tolling provision allows the State to conserve scarce resources by potentially avoiding the time and expense associated with extradition. Rather than initiating extradition, the State may decide, in its discretion, to see whether a person returns to the State before prosecution. Conserving scarce resources is a reasonable basis for relying on the tolling provision at issue here.[19]

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[18] *See Jones v. Helms*, 452 U.S. 412, 419, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981).

[19] *See State v. Norby*, 122 Wn.2d 258, 263, 858 P.2d 210 (1993) (recognizing that important societal interests, such as conserving "scarce resources," are served by allowing

In short, *Bendix* does not support the conclusion that the tolling provision here so burdens interstate commerce as to violate the commerce clause. There is nothing here that is akin to the onerous imposition of the requirement to appoint a local agent for service of process for all causes of action as in that case. And in contrast to *Bendix*, the State has a strong interest here in enforcing alleged violations of its criminal laws. The State's interest in conserving scare resources by avoiding the time and expense of extradition is not an unreasonable rationale for deferring prosecution based on the tolling provision of the statute. McDonald fails in her burden to show beyond a reasonable doubt that the tolling provision of the statute is unconstitutional.

We adhere to the rule stated in *Ansell* and *Newcomer*. The statute of limitation was tolled while McDonald was absent from the state. The charges were timely.

We affirm the judgment and sentence.

The remainder of this opinion has no precedential value and will not be published.[20]

Due Process

McDonald next contends that the State violated her procedural due process rights under the fourteenth amendment by the lengthy preaccusatorial delay. We hold

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prosecutors the discretion to delay filing criminal charges until they are fully satisfied that the charges should be filed) (citing *United States v. Lovasco*, 431 U.S. 783, 795, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977)).

[20] RCW 2.06.040.

that any prejudice by the delay was outweighed by the State's legitimate interests. There was no due process violation.

Preaccusatorial delay may violate a defendant's right to due process under the United States Constitution.[21] In *Norby*, our Supreme Court adopted the *Lovasco* Court's cautioning words that the due process clause:

> does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. Judges are not free, in defining "due process," to impose on law enforcement officials our "personal and private notions" of fairness and to "disregard the limits that bind judges in their judicial function."[22]

Prosecutors have broad discretion in their charging determinations.[23] According to *Norby*:

> Allowing prosecutors broad discretion to delay the filing of charges until they are "completely satisfied that [they] should prosecute and will be able promptly to establish guilt beyond a reasonable doubt", *Lovasco*, at 795, serves important societal interests. Forcing prosecutors to proceed precipitously may waste scarce resources on cases in which the defendant's guilt cannot be established beyond a reasonable doubt. More devastating, however, is the risk that incomplete police investigation will result in charges being brought against innocent

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[21] *Norby*, 122 Wn.2d at 262 (citing *Lovasco*, 431 U.S. 783).

[22] *Norby*, 122 Wn.2d at 263 (citing *Lovasco*, 431 U.S. at 790.

[23] *Norby*, 122 Wn.2d at 263.

> persons. These are costs that society should not bear. *Lovasco*, at 793-94.[24]

To determine whether a due process violation exists, we apply the following three-part test from *Norby* and *Lovasco*:

> (1) The defendant must show she was prejudiced by the delay; (2) the court must consider the reasons for the delay; and (3) if the State is able to justify the delay, the court must undertake a further balancing of the State's interest and the prejudice to the accused.[25]

With these criteria in mind, we proceed to apply them to the facts of this case.[26]

McDonald first makes much of the fact that the length of the delay here exceeds that of any other reported Washington case. Relying primarily on *State v. Haga*,[27] McDonald contends that the length of the prefiling delay established a presumption of prejudice.

In *Haga*, this court reviewed a claim that a five-year delay in the filing of murder charges violated the defendant's due process rights. There was no statute of limitation for murder. Thus, that case focused on the due process rights involved in preaccusatorial delay. The

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[24] *Norby*, 122 Wn.2d at 263 (citing *State v. Lidge*, 111 Wn.2d 845, 850, 765 P.2d 1292 (1989)).

[25] *Norby*, 122 Wn.2d at 263.

[26] *See State v. Gidley*, 79 Wn. App. 205, 901 P.2d 361 (1995); *Norby*, 122 Wn.2d at 263-64; and *State v. Gee*, 52 Wn. App. 357, 367-68, 760 P.2d 361 (1988), *review denied*, 111 Wn.2d 1031 (1989).

[27] 8 Wn. App. 481, 507 P.2d 159 (1973), *review denied*, 82 Wn.2d 1006 (1973).

court mentioned a suggestion of Justice Brennan in a concurring opinion that once a delay reached a certain length, prejudice would be presumed.[28] But neither Justice Brennan nor the *Haga* court indicated at what point such a presumption would arise. Rather, that court analyzed whether the prefiling delay actually prejudiced the defendant. That approach is, of course, consistent with the first criterion stated in *Norby*. Thus, we proceed to analyze the due process claim in terms of that criteria rather than attempting to articulate a time frame at which point a presumption of prejudice arises.

McDonald asserts two types of prejudice. We first address McDonald's argument that the delayed charging occurred after her father destroyed boxes of her files that would have been important to her defense. She contends that she could have reconstructed from those files a record of what fees were due to her. From that reconstructed record, McDonald hoped to prove that she earned some of the funds on which the theft charges are based.

Whether McDonald would have been able to reconstruct such records from the destroyed files given that she never kept any client ledgers is an open question. But accepting as true the claim that the files would have been useful in her defense, we believe that she has shown prejudice.

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[28] *Haga*, 8 Wn. App. at 486 (citing *Dickey v. Florida*, 398 U.S. 30, 90 S. Ct. 1564, 26 L. Ed. 2d 26 (1970) (Brennan, J., concurring)).

We turn now to the second prong of the analysis set forth in *Norby*: the State's reasons for the delay.

The State contends that it waited to bring theft charges against McDonald until the federal proceedings were concluded to avoid duplicate or unnecessary work. McDonald's father testified that he destroyed his daughter's client files sometime around June 1994, immediately following McDonald's conviction and sentencing in federal court. He did not discuss his intention to destroy the files with McDonald, believing that the federal prosecution concluded the only action that might be taken against her.

Mr. McDonald destroyed the client records immediately following his daughter's federal conviction and sentencing. Thus, the only relevant period of delay for the due process analysis related to those records is the period of time between when the alleged offenses were committed and when the federal conviction and sentencing occurred. Any delay beyond that time is irrelevant because once documents were destroyed, the degree of prejudice was fixed.

Deferring to the federal prosecution before bringing state charges against McDonald is a fair reason for the preaccusatorial delay.[29] In *Pizzuto*, we rejected the argument that the State failed to act with good faith and due diligence to bring Pizzuto to trial when it subordinated its extradition request to Idaho's request. Pizzuto had

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[29] *See State v. Pizzuto*, 55 Wn. App. 421, 778 P.2d 42, *review denied*, 113 Wn.2d 1032 (1989).

been arrested in Montana and was held on arrest warrants from both Washington and Idaho. Pizzuto waived extradition to Washington two weeks before waiving extradition to Idaho. But Washington agreed to subordinate its request for Pizzuto to Idaho's request. We rejected Pizzuto's argument that Washington's decision to defer to Idaho's extradition request showed a lack of good faith and due diligence, stating: "Public policy requires that a defendant charged in several jurisdictions receive a prompt and fair trial on each set of charges. This requires comity and cooperation between jurisdictions, not competition."[30]

Here, the State deferred to the federal prosecution before filing charges against McDonald. Had the federal prosecution fully addressed the matter and resolved it to the State's satisfaction, the State would likely not have filed separate charges and would have avoided a needless expenditure of resources.

Because the State has justified its delay, we address the final prong of the analysis and balance the State's interest and the prejudice to the accused. We hold that the significant State interest in conserving scarce resources and cooperating with other jurisdictions outweighs any prejudice to McDonald from the loss of her client files.

We turn now to McDonald's second argument that the delayed charging impaired her ability to present a diminished capacity defense. McDonald's expert witness, Dr. G. Christian Harris, testified that by the time he met McDonald in 1997, he was unable to state with 90%

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[30] *Pizzuto*, 55 Wn. App. at 432.

certainty whether she suffered a recognized mental illness at the time of the thefts. Rather, given the time lapse, he could only state that it was "more probable than not" that she had a mental disorder which diminished her capacity to form the necessary intent to steal.

Under the proper standards governing admissibility of evidence, the delay in examination and testimony does not establish prejudice to McDonald. Expert opinion testimony concerning a person's mental status is admissible if the opinion is held with reasonable medical certainty.[31] This standard requires that the facts more probably than not support the expert's opinion.[32]

Here, Dr. Harris testified that it was more probable than not that McDonald suffered a mental disorder that was causally connected to a lack of specific intent. He also testified that had he seen McDonald several years earlier, he would have been able to state his opinion about McDonald's mental state with a higher degree of certainty. The admissibility of the evidence was not in question, and thus there was no prejudice in this respect.

McDonald also argues that the expert testimony had decreased weight in the eyes of the trial judge. She argues that her diminished capacity defense could have been more persuasive had Dr. Harris been able to state his opinion about her mental state with a higher degree of certainty. As we noted above, the reasonable medical

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[31] *In re Detention of A.S.*, 91 Wn. App. 146, 160, 955 P.2d 836 (1998), *aff'd*, 138 Wn.2d 898, 982 P.2d 1156 (1999).

[32] *A.S.*, 91 Wn. App. at 160.

certainty standard requires only that the facts more probably than not support the expert's opinion. And here, the trial judge specifically disabused Dr. Harris of his belief that the reasonable medical certainty standard requires a 90 percent degree of certainty: "When we say reasonable medical certainty in a courtroom, we mean on a more-probable-than-not basis."

Applying that standard, the trial judge concluded that McDonald's diminished capacity defense "was still viable." Nonetheless, the judge also recognized that the defense was "not as strong as it would have been had there been no pre-accusatorial delay." Thus, McDonald has shown prejudice in that the weight of the medical evidence supporting her diminished capacity defense was adversely affected by the delay.

The relevant period of time for analyzing this argument of prejudice is the time between McDonald's return to Washington in September 1995 and the filing of charges in April 1997. This is so because the statute of limitation was tolled while McDonald was out of state.

The State contends that its delay was reasonable. Two investigators testified that they interviewed witnesses and examined numerous bank records in the interim between McDonald's return and the State's filing of charges against her. According to their testimony, the investigation took roughly four weeks.

We turn to the final prong of the analysis and balance the reasons against the prejudice to McDonald.

McDonald argues that the delay here was not justified simply on the grounds that the State took 19 months

to conduct a one month investigation. But that is not dispositive. As the trial court observed on its oral ruling on McDonald's motion to dismiss, investigations do not necessarily occur from beginning to end with no interruptions. The prosecutor's office conducts numerous investigations simultaneously, and the priorities given to those on-going investigations are best set by the prosecutors, not the courts.[33]

Relying on *Dixon*,[34] McDonald also argues that the trial court improperly considered the harm to the victims in this final prong of the analysis. After recognizing the State's deference to the federal prosecution and the need for further investigation, the trial judge stated:

> The court then looks to further balancing of the State's interests, and in this case, there are six victims whose cases were not considered in the federal matter, and tens of thousands of dollars that are alleged to have been lost through this theft.
>
> So I think the State's interest is significant, and that it outweighs the prejudice to the defense in this case from pre-accusatorial delay.

In *Dixon*, our Supreme Court held that "the seriousness of a crime is not a proper criterion for determining whether a delay in charging is justified.[35] But the record here does

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[33] *See State v. Dixon*, 114 Wn.2d 857, 862-63, 792 P.2d 137 (1990) (stating that the reviewing court does not substitute its judgment for that of the prosecutors in deciding when charges should be filed).

[34] 114 Wn.2d at 861-62.

[35] *Dixon*, 114 Wn.2d at 862.

not reflect that the trial judge balanced the seriousness of the alleged crimes in favor of the State. Rather, the judge recognized that the State charges related to victims whose cases were not included in the federal prosecution and that therefore required further investigation.

We hold that the State interests here outweigh the prejudice to the weight of McDonald's diminished capacity defense. And we find no due process violation in this respect or with respect to the prejudice caused by the loss of McDonald's client files.

McDonald also contends that the preaccusatorial delay prejudiced her because by the time she was charged, convicted, and sentenced in King County, she had a federal conviction on her criminal record. That conviction increased her offender score by one point. It is unclear whether this is part of her due process claim or is intended to stand separately. In either event, we disagree with the argument.

Again relying on *Dixon*, McDonald contends that she was prejudiced by the State's prefiling delay. She argues that the remedy for that prejudice is omitting the federal conviction from her offender score. *Dixon* does not support her position.

There, our Supreme Court acknowledged that a juvenile defendant is prejudiced by a prefiling delay that deprives him of the benefits of prosecution in juvenile court. But despite the prejudice, the court held that the State violates a defendant's due process rights by prefiling delay only when the delay is intended to deprive the defendant of a juvenile court prosecution.

Here, McDonald claims that the State's delay deprived her of the benefits of a lower offender score because the federal conviction raised her offender score.

RCW 9.94A.360(3) states that federal convictions must be counted in a defendant's offender score under certain circumstances:

> Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

Pursuant to this statute, McDonald's federal conviction for bank fraud was properly scored as a class C felony equivalent. And she cites no persuasive authority to demonstrate why the trial court should not have followed the mandatory provisions of the statute. Absent a due process violation, and we have determined that there is none here, there is simply no authority supporting the view that the trial court erred in following the statutory provision regarding sentencing.

To summarize, despite the prejudice to McDonald of the loss of her client files and of the weight of her diminished capacity defense, McDonald has failed to

demonstrate a violation of her due process rights on the basis of preaccusatorial delay.

Article 1, Section 10

McDonald argues that the preaccusatorial delay here violated article 1, section 10 of the state constitution. We decline to resolve the issue.

The constitutional provision at issue states: "Justice in all cases shall be administered openly, and without unnecessary delay."[36] McDonald claims the provision renders the tolling statute unconstitutional as applied to her. The State maintains that the provision applies only to post-accusatory proceedings.[37]

A statute is presumed to be constitutional, and the party attacking it has the heavy burden of proving its unconstitutionality beyond a reasonable doubt.[38] McDonald had failed to meet her burden. We note with respect to this burden the observation our Supreme Court made in *State v. Johnson*:

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[36] Const. art. 1, section 10.

[37] The State cites the following cases to support its argument that the state constitutional provision applies only to post-filing delay: *State v. Vukich*, 158 Wash. 362, 364, 290 P. 992 (1930) (time between filing and trial did not violate article 1, section 10); *State v. Smith*, 68 Wn. App. 201, 209, 842 P.2d 494 (1992) (a defendant has a right to an appeal without unnecessary delay); *State v. Harp*, 13 Wn. App. 273, 275, 534 P.2d 846, *review denied*, 85 Wn.2d 1016 (1975) (article 1, section 10 requires that accused persons be brought to trial without unnecessary delay).

[38] *Shultz*, 138 Wn.2d at 642.

> Parties raising constitutional issues must present considered arguments to this court. We reiterate our previous position: " 'naked castings into the constitutional sear are not sufficient to command judicial consideration and discussion.' "[39]

McDonald's sole authority for her argument is *State v. Smith*.[40] There, the court addressed the question of delay during the appeals process. Thus, that case is of no help in rebutting the contention of the State that the provision does not apply to preaccusatorial delay, which is the delay at issue here.

McDonald cites no other authority to support her argument. She offers no textual analysis, examination of constitutional history, or other discussion that would be of assistance in resolving this matter. And McDonald has not suggested any reason why the due process analysis that we have already performed is either inadequate to provide appropriate protection or different in scope from this state constitutional provision.[41]

For these reasons, we decline to address this constitutional issue.

Given our resolution of the above issues, we need not address whether the trial court erroneously believed that

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[39] 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (quoting *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)).

[40] 68 Wn. App. 201.

[41] *See State v. Gunwall*, 106 Wn.2d 54, 65-67, 720 P.2d 808 (1986) (delineating six non-exclusive factors courts consider to determine whether state constitutional protections are greater than or coextensive with the federal constitution.)

the State would be required to extradite all out-of-state defendants if the statute of limitation were not tolled. Additionally, we do not address McDonald's argument that we should construe the statute of limitation narrowly, as applying only to those persons concealing themselves out of state, so as to avoid constitutional issues.

We affirm the judgment and sentence.

/s/ Cox, J.

WE CONCUR:

/s/ Webster, J /s/ Becker, A.C.J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE

STATE OF WASHINGTON, Respondent, v. KIMBERLEE ANN McDONALD, Appellant.	No. 42359-2-I **ORDER ON MOTION FOR RECONSIDERATION AND MODIFYING OPINION**

Kimberlee McDonald seeks reconsideration of this court's decision terminating review in her Motion for Reconsideration dated June 2, 2000. This court considered the motion and the State's Response to Motion to Reconsider dated August 17, 2000.

Now, therefore, this court,

ORDERS that:

1. Page 17 of the slip opinion of this court's decision, which was filed on May 15, 2000, is hereby modified by striking the first paragraph on that page and substituting the following paragraphs:

> As McDonald correctly argues in her motion for reconsideration, the relevant time period for determining if she suffered prejudice includes the period between December 1990 and September 1995. That was the period during which she was out of state and the statute of limitations was tolled.

With respect to that time period for which McDonald has established prejudice, we next consider the State's reasons justifying the delay. As we previously noted in this opinion, the State deferred to the federal prosecution for much of this time during which McDonald was outside Washington. Moreover, it appears that it continued to direct its resources to other matters while McDonald remained outside Washington following her federal sentencing. This is sufficient justification for the same reasons we previously articulated in this opinion.

Moving to the final prong of the analysis, we further balance the State's substantial interest in prosecuting crime and conserving its scarce resources against the prejudice to McDonald of the diminished persuasiveness of her medical expert trial testimony. On this record, we cannot conclude that the balancing tips in favor of McDonald. We note that there was no question that she had committed the criminal acts. Her claim of prejudice focuses on her mental state while committing those acts. Her medical expert at trial did eventually testify, based on the proper standard, that she had a diminished mental capacity at the time she committed the acts. McDonald contends that he would have been able to testify more persuasively had he seen her earlier. Whether the trial court would have

been persuaded of the lack of the required *mens rea* had the expert testified earlier is, at best, speculative. Thus, we cannot conclude from the record that McDonald has met her burden to demonstrate that the State deprived her of due process for that period during which she was outside Washington.

2. Page 1 of the slip opinion is hereby modified by striking the words "commerce clause" in the last sentence of the first paragraph on that page and substituting the words "Commerce Clause." The same substitution of words is hereby made at page 3 of the slip opinion in the sentence that begins with "McDonald claims . . . " The same substitution is hereby made at the bottom of page 5 and the top of page 6 at the sentence beginning with "She argues . . . " Likewise, the same substitution is hereby made at page 7 of the slip opinion in the first sentence of the fourth paragraph on that page.

3. Except for the above modifications to the opinion, the court denies the motion.

Done this 9th day of November 2000.

FOR THE PANEL:

/s/ Cox, J.
Judge

APPENDIX C

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KIMBERLEE ANN McDONALD, Petitioner.	NO. 70528-3 **ORDER** C/A NO. 42359-2-I (Filed Mar. 6, 2001)

Department II of the court considered this matter at its March 6, 2001, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS SO ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 6th day of March, 2001.

/s/ Gerry L. Alexander
CHIEF JUSTICE